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IN THE

Supreme Court of the United States

October Term, 1967

No. 528.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

MEMORANDUM IN RESPONSE TO THE SOLICITOR GENERAL'S MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE.

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Petitioners respectfully submit this memorandum in comment upon the Solicitor General's memorandum for the United States as *Amicus Curiae*.

We shall summarize the United States' position as we understand it, and then offer those brief comments which we feel are appropriate.

1. The Court of Appeals below "has misread the Warsaw Convention". (Memorandum, p. 6).

We agree.

2. The United States believes that the legal effect of a carrier's failure to satisfy the ticket provisions of Article 3 by failing to deliver a proper ticket is to "bar the carrier's right to avail itself of the Convention's provisions limiting liability to $8,300 per passenger." (Memorandum, p. 9).

We agree.

3. The United States argues that if the carrier fails to comply with Article 3, it can "be held liable for actual damages unless it shows that it took all appropriate measures to avoid the injury." (Memorandum, p. 9).

We disagree with the government's construction to this crucial extent. Once a breach of Article 3 occurs, the Convention imposes absolute liability, and the carrier is absolutely barred from raising *any* defenses one of which is "that it took all appropriate measures to avoid the injury". We believe that is the clear meaning of the Convention's Article 3(2) which provides:

> "The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the

less be subject to the rules of this convention. *Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.*" (Emphasis supplied.)

Our suggested construction is totally consistent with the plain language of the provision. It is completely confirmed by *Westminster Bank, Ltd. v. Imperial Airways, Ltd.*, 2 All E. Rep. 890, 1 Avi. 618 K. B. (1936). Not only the English courts so understand the Convention but two federal circuits also point in the same direction. *Warren v. Flying Tiger Line, Inc.*, 352 F. 2d 494 (C. A. 9, 1965) and the remand in *Glassman et al. v. Flying Tiger Line*, 9 Avi. 18,295 (D. C., N. D. Cal., 1966); *Alitalia-Linee Aeree Italiane S. p. A. v. Lisi*, 370 F. 2d 508 (C. A. 3, 1966), cert. granted, 6 November 1967, Appellate Docket No. 70. Simply stated, in our view a carrier which fails to deliver a proper ticket is absolutely and unlimitedly liable and is not permitted to offer any defense to either limit or exclude its liability.

But the Court of Appeals below has taken directly conflicting views. *Berguido v. Eastern Airlines, Inc.*, 369 F. 2d 874, 879 (C. A. 3, 1966).

By holding that even though an inadequate ticket has been delivered the burden is still upon a plaintiff to prove negligence, the Court of Appeals below has rejected both the position of petitioners here that in such instance there is absolute liability, and also the position of *Mertens v. Flying Tiger Line, Inc.*, 341 F. 2d 851 (C. A. 2, 1965), cert. denied 382 U. S. 816 (1965), rehearing denied 382 U. S. 933 (1965), and the Solicitor General. Both *Mertens* and the Solicitor General agree that, given an inadequate ticket, the *carrier*

must prove that "it took all appropriate measures to avoid the injury."

Now we have not only conflicts between circuits but the further grave complication of the United States—a major signatory to this important convention—construing it in a way which aggravates the conflict between the Second and Third Circuits.

We respectfully submit that this is a classic example of a situation in which this Honorable Court should exercise its powers of certiorari. Not to do so in an era of enormous expansion of international air traffic is gravely to compound the serious legal difficulties which increasingly surround the Convention.

For this reason alone, the Petition ought to be granted. It is the occasion for announcing a long overdue and authoritative instruction on the meaning of this muddied body of important law.

Such an instruction is crucial not only to the disposition of this case but to *Lisi* as well. If this Court decides that the *Lisi* ticket is legally inadequate, the trial court in *Lisi* will have to decide whether (1) the trial should proceed on the issue of damages alone—as we contend—; or (2) whether the trial should proceed with the defendant permitted to establish "that it took all appropriate measures to avoid the injury"—as *Mertens* holds and the Solicitor General contends;* (3) or whether the plaintiff in *Lisi* must bear the burden of proving negligence—as the *Berguido* Court of Appeals held.

These are the irreconcilable conflicts in the state of Warsaw law in the United States today, and the reason that this case should be granted certiorari.

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* This problem is not present in the case at bar. Respondent has admitted that it cannot establish "that it took all appropriate measures to avoid the injury" by tendering the $8,300.

4. The United States suggests that "the present state of the record provides an insufficient basis for determining whether Eastern failed to deliver an adequate ticket . . .". (Memorandum, p. 11.)

We disagree.

The record on this issue has been made. Eastern Airlines had an opportunity to make it. Indeed, to meet its burden of proof it had the duty to make a record on the ticket issue. Eastern Airlines used that opportunity to make its defense.

In the face of the trial record, it is nothing less than shocking to read its argument at pp. 7-13 of its brief herein, and to read this brazenly inaccurate statement at p. 2 of that brief: "The ticket is not in evidence . . .".

What does the trial record show? In the Appendix herewith (pp. 760a-762a of the trial record) counsel for Eastern Airlines literally began his client's defense of this case by offering "the tickets" into evidence. It was the very first piece of evidence in Eastern Airlines' case. In obvious recognition of a Warsaw defendant's burden to prove the applicability of the Convention by first proving the crucial ticket requirements, counsel for this respondent carrier made that effort to carry its burden.

"The tickets", to use this respondent's own words, are most certainly in evidence. This respondent put them there. It is inexcusable to see counsel for respondent making absolutely antithetical representations to this Honorable Court.

We have waived nothing with respect to the tickets. What we have done is a very different thing, and that is to confess our misunderstanding of the legal significance of a breach of Article 3(2). But that confession was made in the Court of Appeals below, and it was fully briefed and argued in advance of judgment and again in our motion for a rehearing below.

The government has unfortunately put forth statements about the decedent which are admittedly not of record, statements which got into this case through the overzealousness of counsel for respondent. This is not the occasion to deal those statements the death blows they deserve.

Putting aside this respondent's indefensible injection of matters *de hors* the record, we see the government using them as a basis for "pertinent exploration by the lower courts" (Memorandum, p. 12) and also casting further confusion into the central issue here and *Lisi:* what are the legal consequences of a ticket which fails to satisfy the demands of the Warsaw Convention?

The record on "the ticket" has been made by this respondent. The lower courts had "the ticket" before them. The judgment of the Court of Appeals was rendered only after that matter was fully presented to it. The case is ripe for adjudication here. To say this is to say all that need be said about the appropriateness of granting certiorari rather than returning the matter to the lower courts here. It is all the more appropriate when we simply add that the catastrophe which killed Carlos Berguido occurred more than twelve years ago.

Respectfully submitted,

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